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Charles J. Avalli  
John Patrick Lydon  
Richard J. Schubert

OCT 31 1997

October 30, 1997

FCC MAIL ROOM

129/JPL

Mr. William F. Caton  
Secretary  
Federal Communications Commission  
Room 222  
1919 M Street NW  
Washington DC 20554

Overnight Mail

RE: MM Docket No. 97-182

Dear Mr. Caton:

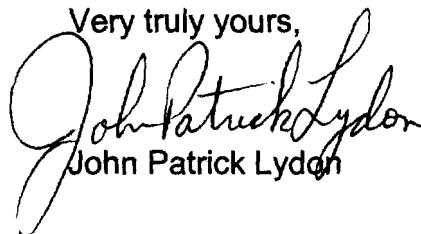
Enclosed please find:

1. An original and five copies of Comments to Notice of Proposed Rule Making Made on Behalf of the Borough of Baldwin, Baldwin Township, Municipality of Bethel Park, Brentwood Borough, Borough of Castle Shannon, Borough of Dormont, Borough of Greentree, Borough of Heidelberg, Borough of Jefferson, Municipality of Mt. Lebanon, Peters Township, Borough of Pleasant Hills, Scott Township, Township of Upper St. Clair, and the Borough of Whitehall which I would request that you file; and
2. One cover sheet of this document and a self-addressed stamped envelope.

After you have filed the original, please stamp the cover sheet as noted in No. 2 above and return it to me in the self-addressed stamped envelope as evidence of the filing.

Thank you for your courtesies in this filing.

Very truly yours,

  
John Patrick Lydon

lmt  
Enclosures

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Before the  
Federal Communications Commission  
Washington DC 20554

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OCT 31 1997

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In the Matter of )

Preemption of State and Local Zoning and Land )  
Use Restrictions on the Siting, Placement and )  
Construction of Broadcast Station Transmission )  
Facilities )

MM Docket No. 97-182

South Hills Area Council of Governments )  
encompassing: )

Borough of Baldwin, CUID No. PA0693 )  
Baldwin Township, CUID No. PA1105 )  
Municipality of Bethel Park, CUID No. PA1231 )  
Brentwood Borough, CUID No. PA1215 )  
Borough of Castle Shannon, CUID No. PA0698 )  
Borough of Dormont, CUID No. PA1106 )  
Borough of Greentree , CUID No. PA1212 )  
Borough of Heidelberg, CUID No. PA1210 )  
Borough of Jefferson, CUID No. PA0706 )  
Municipality of Mt. Lebanon, CUID No. PA1344 )  
Peters Township, CUID No. PA1519 )  
Borough of Pleasant Hills, CUID No. PA1232 )  
Scott Township, CUID No. PA1209 )  
Township of Upper St. Clair, CUID No. PA1459 )  
Borough of Whitehall, CUID No. PA0889 )

**COMMENTS TO NOTICE OF PROPOSED RULE MAKING MADE ON  
BEHALF OF THE BOROUGH OF BALDWIN, BALDWIN TOWNSHIP,  
MUNICIPALITY OF BETHEL PARK, BRENTWOOD BOROUGH,  
BOROUGH OF CASTLE SHANNON, BOROUGH OF DORMONT,  
BOROUGH OF GREENTREE , BOROUGH OF HEIDELBERG, BOROUGH  
OF JEFFERSON, MUNICIPALITY OF MT. LEBANON, PETERS  
TOWNSHIP, BOROUGH OF PLEASANT HILLS, SCOTT TOWNSHIP,  
TOWNSHIP OF UPPER ST. CLAIR, AND THE BOROUGH OF  
WHITEHALL**

1. The Commission has requested Comments on its Notice of Proposed Rule  
Making regarding potentially preempting state and local zoning and land use ordinances  
as they pertain to broadcast transmission facilities.

2. These Comments are filed on behalf of the South Hills Area Council of Governments which consists of fifteen member communities in southern Allegheny County, Pennsylvania (adjacent to the City of Pittsburgh) and on behalf of Peters Township in Washington County, Pennsylvania. These communities encompass 227,000 citizens.

3. The Notice does not establish a need for the Commission to override the clear role that Congress envisioned for state and local governments to exercise in the context of zoning and land use ordinances. The Commission notes some anecdotal reports of delays in obtaining tower construction permits for some broadcast transmission facilities and proposes, in effect, to cripple local zoning and land use powers of the local government. Local zoning and land use ordinances have a long and well-established history in the law. Congress specifically recognized this important role for state and local authorities. 47 U.S.C. §332. The proposal by the Commission would in effect render this power meaningless to local governments, particularly so in inverse relation to the size of a government unit.

4. The egregious nature of the proposal is particularly evident when the Notice requests Comments as to whether the Commission should preempt regulation for all broadcast transmission facilities. No basis whatsoever is established in the Notice as to why this should take place. The issue ostensibly arises only as a result of the construction of facilities concerning digital television service and potential issues involving those FM broadcast stations that have collocated their FM antennae on television towers and may be forced to relocate.

5. The proposal also makes the assumption that towers cannot exist in communities and still meet some aesthetic requirements. No basis is set forth in the Notice

to show that these requirements impair the ability of the towers to be built in a timely fashion. Aesthetic requirements are viewed by the American people in many communities as very important and there should be no reason why a tower cannot meet some aesthetic requirements and co-exist with the surrounding community. Nonetheless, the proposal suggests that only safety or health objectives could be considered by state and local governments. No authority is put forward as to where the commission receives the power to preempt such local issues or why it is necessary.

6. The proposal as set forth in the Notice violates the 1996 Telecommunications Act. The Commission throughout the Notice suggests that it has unbridled authority to preempt any local and state regulation whatsoever that in any way slows or hinders the building of broadcast transmission facilities. This proposal overlooks the clear language of the 1996 Telecommunications Act which specifically recognizes the ability of state and local governments to act on requests to place, construct or modify personal wireless service facilities and which establishes (as the Commission acknowledges in footnote 8), an appeal process to a court of competent jurisdiction. The Act sets forth that this court will "decide such action on an expedited basis". 47 U.S.C. §332(c)(7)(B)(v). Nonetheless, the Commission assumes that it must act to strip these courts of the jurisdiction Congress granted them because they will not act in a manner the broadcasts deem to be sufficiently expedited. The proposed Rule states that the appeal process will exclusively reside with the Commission or, in the alternative, that the Commission may determine that jurisdiction will lie solely in an alternative dispute resolution process instead of with the courts of competent jurisdiction. No basis is set forth as to how the Commission can preempt the Congressional scheme of appeal given the clear language set forth in the 1996

Telecommunications Act. The Commission cannot claim to follow the spirit of the statute while ignoring the specific language. It is particularly interesting to note that under the proposal only the Applicant would have the ability to invoke mandatory ADR and not the state and local governments.

7. The proposal sets forth certain arbitrary time considerations ranging from 21 to 45 days during which the state or local government must act on an application. This time period was set forth with apparently no regard for the workings of local government. Local governments do not as a rule have a large bureaucracy ready to consider a zoning or land use application. The Boards that often hear these issues, particularly in the communities represented by these Comments, have volunteers from the community who decide the issues, albeit with strong state law provisions to protect due process. While most communities have local zoning officers who investigate the application, there is often a need to retain skilled consultants and to provide a due process hearing for all interested parties including the citizens. Paragraph 4 of the Notice recognizes that there are a number of logistical problems in constructing a significant number of towers but then passes over these issues to suggest that unless local governments act within 21 to 45 days on zoning issues, the local governments will create a bottleneck such that a need extending through May 1, 2003 will not be met. There is no reason in a building schedule that spans a six year period to determine that a local governmental unit must act within 21 to 45 days or else the entire process stalls. Rather, the proposal should require a Broadcaster to give significant advance notice of its intention to modify or construct a tower. The Commission has established a schedule now which broadcasters understand they will have to meet over the next several years. Given the logistical problems alluded

to by the Commission in paragraph 4 of the Notice, there should be significant time between the realization of the need by a broadcaster for modification, construction or movement of a tower and the anticipated completion date. No regard seems to have been given to this issue by the Commission. A broadcaster has ostensibly a great deal of expertise in presenting its proposal to the community. It is suggested that the Commission would be better served by requiring significant advance notice to the state or local governmental unit by the broadcaster and by requiring detailed information to be provided at the earliest possible date. It is extremely difficult for a local governmental unit to act in less than ninety (90) days after receipt of all applicable information. The state or local government unit should have the ability to request additional reasonable information and any time period for its decision should only commence after receipt of the information.

8. Some issues in the Notice involve areas in which the Commission already has the ability to act including issues regarding radio frequency emissions, interference with other telecommunications providers, and Commission and FAA requirements as to lighting and marking requirements. Those issues recognize the essential nature of the federal system but there must also be a co-existence of federal regulations with state and local ordinances.

9. The attempt to shift the burden from a broadcaster to local government as to whether the application for the tower meets proper requirements has no basis in fact or law. The broadcaster is presumed to have easier access to information regarding tower construction issues, is aware of the need for a change long before the local government, and logically should be required to establish that the tower meets reasonable standards. Trying to shift this burden to local government is another example of the federal

government mandating requirements on state and local governments without regard to the needs and concerns of the state and local units. Normally logic and the law require that the party who seeks to change the status quo and who claims to have ready access to more information and expertise should bear the burden of proving its position. In all safety issues, the principles of safety engineering require the same process.

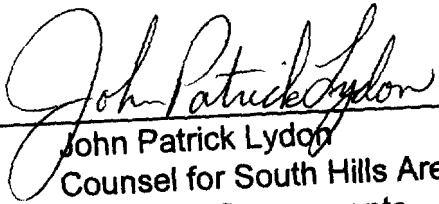
10. The Commission should recognize the appropriate and proper role of state and local governments in enforcing their zoning and land use ordinances as Congress anticipated. The Commission can play a major role in this legislative scenario by acting as a clearinghouse for competent safety and construction information that is made readily available to local and state governments that receive an application to construct, modify or move a broadcasting tower. Likewise, state and local governments would look more favorably on a voluntary ADR process, particularly if it could be shown to be fair, have due regard for state and local legitimate concerns, and offer an inexpensive alternative to a court proceeding. Attempting to force state and local governments to enter such a process, particularly at the whim of an applicant who has the option of pursuing a process before the Commission, a court or an ADR, is not only inappropriate, but such a proposal is disrespectful to the roles that state and local governments exercise in a federal system representing their citizens. It has long been determined that zoning and land use ordinances are an important government function and should not be reduced to a mere rubber stamp action with inadequate time for review at the whim of an applicant that wishes to construct a broadcast tower.

11. The Proposed Rule is overly broad, fails to set forth a reasonable basis for such a preemption and violates the spirit and language of the 1996 Telecommunications

Act by attempting, for all practical purposes, to all but eliminate the role of state and local government in their legitimate need to regulate the construction of broadcast towers.

Respectfully submitted,  
AVALLI LYDON & SCHUBERT, P.C.

Dated: October 30, 1997

By   
John Patrick Lydon  
Counsel for South Hills Area  
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Borough of Baldwin, Pennsylvania  
Baldwin Township, Pennsylvania  
Municipality of Bethel Park,  
Pennsylvania  
Brentwood Borough, Pennsylvania  
Borough of Castle Shannon,  
Pennsylvania  
Borough of Dormont, Pennsylvania  
Borough of Greentree, Pennsylvania  
Borough of Heidelberg, Pennsylvania  
Borough of Jefferson, Pennsylvania  
Municipality of Mt. Lebanon,  
Pennsylvania  
Peters Township, Pennsylvania  
Borough of Pleasant Hills,  
Pennsylvania  
Scott Township, Pennsylvania  
Township of Upper St. Clair,  
Pennsylvania  
Borough of Whitehall, Pennsylvania

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